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(2)

No. 07-7

8-16-2007

IN THE SUPREME COURT OF THE UNITED STATES

A.J. ARAVE,

Petitioner,

vs.

MARK HENRY LANKFORD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION

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COUNTER STATEMENT OF QUESTIONS PRESENTED

Is certiorari appropriate to review a Court of Appeals decision which properly stated and applied the relevant standard of prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984)?

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1. PARTIES TO THE PROCEEDING BELOW

Petitioner Arave is the warden of the Idaho Maximum Security Institution.

Respondent Mark Lankford is a prisoner in that institution.

2. STATEMENT OF THE CASE

Petitioner, in seeking certiorari before this Court, does not challenge the Court of Appeals' conclusion that the attorney provided deficient performance at trial. Rather, Petitioner asserts that there was no prejudice to Mr. Lankford and that the Court of Appeals applied a lesser standard than that set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) and its progeny. As discussed below, a simple examination of the decision belies that argument.

Respondent Mark Lankford, hereinafter "Mark," was convicted of first degree murder and sentenced to death in Idaho County, Idaho in 1984. He was charged along with his brother Bryan Lankford, who was tried separately and testified against Mark. As the opinion notes, Bryan recanted his trial testimony and provided information that supports the conclusion that Mark did not participate in the robbery or murders. (*Lankford v. Arave*, 468 F.3d 578 (9th Cir. 2006) (Petition App. at 1.)

At trial Mark was represented by an inexperienced court-appointed attorney who had never handled a murder case, much less a capital case. The Court of Appeals described the attorney's experience in the following terms:

> FitzMaurice was a part-time public defender who had, it seems, only tried one previous major felony: a case of cattle-rustling. He had never defended a murder case, and had no training in capital defense. He delivered no

> opening statement to the jury, and called no witnesses. He did not secure a second attorney, an investigator (except for a fingerprint analyst), an independent pathologist, or an independent psychologist to aid in preparing a defense.

Lankford v. Arave, 468 F.3d at 585, fn. 3.

On appeal and in the consolidated state post-conviction petition, Mark continued to be represented by the same court-appointed counsel. As a result, the initial state petition did not raise any allegations of violations of the Sixth Amendment right to effective assistance of counsel, and his conviction and sentence were affirmed in the state courts.

Mark was appointed new and separate counsel to assist in the filing of a federal habeas corpus petition. A petition was thereafter filed in 1992. Mark returned to state court to raise claims involving his Sixth Amendment right to counsel; however, the State asserted that such claims were barred by the application of an Idaho statute barring claims not raised within forty-two days of the conviction and sentence. See, I.C. § 19-2719. As a result of the State's assertion of procedural default, Mark's post-conviction petition was denied on procedural grounds, and the state court did not examine the merits of the claims. See, *Lankford v. State*, 897 P.2d 991 (Idaho 1995).

The federal district court originally upheld the validity of the state procedural rule, and Mark appealed. However, the State stipulated to a remand before the appeal could be decided and after the decision in *Hoffman v. Arave*, 236 F.3d 523 (9th Cir. 2001), which held that the Idaho procedural default rule was not a bar to consideration of the Sixth

Amendment right to effective assistance of trial counsel claims. (Respondent's Appendix, Docket of Ninth Circuit Court of Appeals, No. 99-99015, hereinafter "Resp. App.," at 6.)

Thereafter, the district court conducted an evidentiary hearing and found deficient performance by counsel but held there was no prejudice. Mark appealed. At oral argument the panel indicated to the parties that a reversal was likely and that the parties might take advantage of the court's mediation program. The parties agreed to a mediation but did not achieve a settlement. (Resp. App. at 10-11.) Thereafter, the Court of Appeals unanimously reversed, finding at least one ground of deficient performance[1] and prejudice. "We conclude there is a 'reasonable probability' that, with proper instructions on the question of corroboration, the jury would not have convicted Mark of first degree murder. *Strickland,* 466 U.S. at 694." *Lankford v. Arave*, 468 F.3d at 589.

The State filed a Petition for Rehearing and Rehearing En Banc on January 3, 2007. That petition was denied without a request for a response on January 29, 2007. The panel judges voted to deny the petition for rehearing and "[t]he full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc." (Petitioner's App. at 58.) The Petition for Writ of Certiorari now pending before this Court was then filed on June 28, 2007.

---

[1]"We find FitzMaurice's error in drafting jury instructions an adequate grounds for reversal. Although we do not reach the other grounds on which Mark contends that FitzMaurice rendered ineffective assistance of counsel, the evidence Mark has presented in support of those claims reinforces our judgment that Mark was prejudiced in this case." *Id.* at 589.

3. PETITIONER CITES NO REASON UNDER RULE 10 FOR THE GRANT OF CERTIORARI

A grant of certiorari is made "only for compelling reasons." Rule 10, Rules of the Supreme Court. In this case, the Petition does not assert one valid reason under Rule 10 for the granting of certiorari in this case. The opinion of the Court of Appeals is not in conflict with decisions of other circuits, nor does the case raise an important issue of federal law that has not been, but should be, decided. See, Rule 10 (a), (c). Petitioner simply disagrees with the Court of Appeals' application of the properly-stated rule in *Strickland*. This is not grounds for the exercise of this Court's supervisory power.

Petitioner concedes that the Court of Appeals "cited the appropriate standard for prejudice." (Petition at 12.) While Petitioner may disagree with the manner in which that court applied the law in this case, "[a] petition for certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Rule 10, Rules of the Supreme Court. Petitioner parses a few words in the opinion to support its claim that the Court of Appeals disregarded the very legal precedents it cited, and, without reference to these guiding principles set forth in the Rules of this Court, requests review here.

4. THE PREJUDICE STANDARD SET OUT IN *STRICKLAND* WAS PROPERLY ADOPTED AND APPLIED IN THIS CASE

Extracting a few words from a lengthy opinion in which the State concedes the appellate court "cited the appropriate standard for determining prejudice" under *Strickland*,

the State argues that these few scattered words – "seem," "appears," and "might" – "significantly reduced the *Strickland* standard to 'a mere possibility' rather than a reasonable likelihood." (Petition at 12.) However, an examination of the detailed review of the law and the facts conducted by the unanimous panel opinion, authored by Judge Bybee and supported by the denial of the Petition for Rehearing En Banc, demonstrates the fallacy of the State's argument.

First, there can be no question that the appellate court understood and applied the proper standard in this case.

> "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. To reverse we must find a "reasonable probability that . . . the result of the proceeding would have been different" had the erroneous instruction not been given. *Id.* at 694; see also *Span*, 75 F.3d at 1390.

Lankford v. Arave, 468 F.3d at 585.

> The error here is a more fundamental one. The jury was instructed to overlook the question of corroboration, and we must ask whether, given proper instructions, there is a "reasonable probability" that the jury would have found Bryan's testimony unsupported. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

Id. at 588.

> We conclude there is a "reasonable probability" that, with proper instructions on the question of corroboration, the jury would not have convicted Mark of first degree murder. *Strickland*, 466 U.S. at 694.

Id. at 589.

The argument that the Court of Appeals mis-interpreted or undermined the standard set forth in *Strickland* must be rejected.

Second, contrary to the allegation in the Petition, the appellate court considered the impact of the instructions as a whole.

> And we must consider the instructions "as a whole" in evaluating the magnitude of the error. *Middleton v. McNeil*, 541 U.S. 433, 437, 124 S.Ct. 1830, 158 L.Ed.2d 701 (2004). "[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Boyde v. California*, 494 U.S. 370, 378, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990) (internal quotation marks omitted); *see also Estelle v. McGuire*, 502 U.S. 62, 72, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991). Accordingly, Mark need not establish error for certain. "[A] defendant need not establish that the jury was more likely than not to have been impermissibly [influenced] by the instruction." *Boyde*, 494 U.S. at 380. "If the charge as a whole is ambiguous, the question is whether there is a *reasonable likelihood* that the jury has applied the challenged instruction in [an impermissible] way . . . ." *Middleton*, 541 U.S. at 437 (internal quotation marks omitted) (emphasis added).

Id. at 585.

> Considering the instruction "in the context of the instructions *as a whole* and the trial record" does not inspire confidence in the reliability of Mark's verdict. *Estelle*, 502 U.S. at 72.

Id. at 587 (emphasis added).

To argue that the Court of Appeals did not understand its responsibility or the applicable law regarding consideration of prejudice from counsel's request for the erroneous instruction verges on the frivolous.

Finally, in applying the facts to the law, the court concluded that "It is hard to imagine a case in which such an instructional error could have caused more damage." *Id.* at 586.

Given the clear language of the opinion, the argument that the appellate court applied a lesser standard than that established by this Court must be rejected and is certainly not worthy of review by this Court. If an appellate court cites the relevant law and then applies it in a well-reasoned manner, there is no need for further review. There is no reason for the grant of certiorari on this question.

5. PETITIONER'S ALLEGATION THAT THE OPINION "DESTROYS PRINCIPLES OF COMITY AND FEDERALISM" IS NOT WORTHY OF REVIEW

Without citation to a single federal case or contrary legal authority, the State argues that a "misstatement of Idaho state law" (Pet. at 16) requires review by this Court, as the opinion "destroys the principles of comity and federalism." (Pet. at 20-21.) Such hyperbole, without any legal support, does not warrant consideration by this Court.

For over twenty years, the State has fought the attempts by Mark to have his Sixth Amendment issues determined on their merits. At each step in the state courts, the State raised procedural hurdles to a decision on the merits, thereby preventing the state courts from asserting their opinions on the merits of the issues. Now, after the federal courts have applied straightforward legal principles, the State argues that the opinion violates some notion of comity and federalism. There is no claim that Mark failed to exhaust his

Sixth Amendment claims or provide the state courts an opportunity to fairly address these issues.

Given the history of this case, the State has waived any right to raise these arguments at this late date. This argument was never raised in the briefs before the district court or the Court of Appeals and was not addressed in the State's Petition for Rehearing and Rehearing En Banc. (Resp. App. at 12-20.)

Having denied the state courts an opportunity to reach the merits of these claims by asserting procedural default throughout the state court proceedings, the State now argues that the federal court's consideration of state law to the merits of this case somehow "destroyed principles of comity and federalism." (Pet. at 17-21.) The State, by its own actions, prevented the state courts from considering these claims and now argues that the federal court's analysis is flawed.

However, the appellate court properly considered the impact of the state law, especially the significance of the role of accomplice testimony and the reasons for the strict Idaho law on corroboration of an accomplice. Moreover, the Court of Appeals examined a number of cases from the state courts in Idaho noting that the question of sufficient evidence of corroboration is measured with a different standard than questions arising from an improperly instructed jury. *Lankford v. Arave*, 468 F.3d at 587-89.

Petitioner argues, again without citation, that since the trial court did not *refuse* to give corroboration instructions, it is proper to analyze counsel's admitted deficient performance under a more stringent sufficiency of the evidence test. (Pet. at 16-17.) The

Court of Appeals applied the correct standard for determining prejudice where improper instruction was the result of trial counsel's deficient performance: is there a reasonable probability of a different result had the jury been properly instructed. In this light, the Court of Appeals applied the correct standard, and thus at most, Petitioner simply disagrees with the opinion's conclusion.

The State next argues that the appellate court did not understand that this matter was charged as a felony-murder and that there needed only to be corroboration of the robbery. However, the appellate court knew Mark was charged with felony-murder, as one of the petition's claims which the court did not have reach was that the malice instruction in felony-murder violated *Sandstrom v. Montana,* 442 U.S. 510 (1979); and he never claimed that he was charged or convicted of any other type of first degree murder. Moreover, if there is any doubt whether the appellate court understood this assertion, the State's petition for rehearing and rehearing en banc filed on January 3, 2007, clarified the doubt when it argued that the panel opinion did not consider the felony-murder charge. (Resp. App. at 12.) Twenty-six days later and without even requesting a response, the petition was denied without a vote of the entire court.

Finally, just as with the actual murder, there similarly was not sufficient corroboration, in light of the incorrect jury instruction, for Bryan's testimony that Mark was involved in the robbery. In essence, Petitioner contends that the factual findings of the opinion are erroneous, which is not a reason to grant certiorari. Rule 10. The Court of Appeals properly concluded that there was a reasonable probability of a different result had

trial counsel not requested the erroneous instruction. Petitioner argues, as he did in the Petition for Rehearing, that the "time-line" and the testimony of Roy Ralmuto provides sufficient corroboration to overcome the erroneous instruction. But the evidence relied upon by the State would apply equally to whether Mark killed or robbed the Bravences; and reliance on Ralmuto's testimony as to the supposed statement made by Mark months after the murders is suspect and insufficient corroboration of Mark's involvement in either the robbery or the murder.

First, the fact that Mark was in the area does not connect him to the commission of the robbery. While his prints were later found on items within the van, the items with his prints were newspapers unrelated to the alleged date of the robbery and murders. Petitioner does not mention that Bryan's fingerprints were on other items, nor that Bryan had carved his initials onto a knife he had taken from the Bravences.

Second, the alleged statement to Ralmuto is not an admission to either the robbery or murder but rather a generalized statement about living in the woods. Indeed, there had been testimony that the Lankford brothers had gone to Idaho specifically to leave their prior life behind, and the statement does not connect Mark to the commission of the offense. Further, Ralmuto was a known sexual deviant who hated Mark because Mark had tried to stop Ralmuto from molesting Mark's brothers, including Bryan. Thus Ralmuto had a reason to lie about Mark on Bryan's behalf.

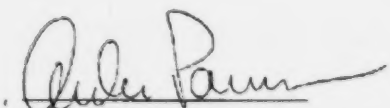
In order to find Mark guilty of the robbery, the jury would have had to believe Bryan, as there was little or no evidence connecting Mark to the robbery or showing that the

killings occurred during the commission of the robbery. Moreover, the Court of Appeals relied extensively on other evidence adduced at the evidentiary hearing in federal district court which demonstrated that Bryan was lying in his testimony against Mark and which supported Bryan's recantation exonerating Mark. As the appellate opinion makes clear, there is a reasonable probability of a different result had Mark been represented by effective counsel, had the jury been properly instructed on the law, and in light of the weakness of the prosecution's case and considering the evidence counsel failed to present to the jury. Certiorari on this question is not warranted.

6. CONCLUSION

The decision of the Court of Appeals is fact intensive, reasonably considered, and supported by other decisions regarding the duties of competent counsel in capital trials. The opinion stated the relevant legal principles, applied the facts to that law, and concluded that Mark was denied the effective assistance of counsel as guaranteed by the Sixth Amendment. There is no "compelling reason" to review this unanimous decision which orders that, after twenty-three years, the State of Idaho must provide Mark Lankford a fair trial where he is represented by competent counsel in this capital case.

Dated: August 16, 2007



Andrew Parnes
Counsel of Record for Respondent
Mark Henry Lankford

APPENDIX

Search for Case

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Help

General Docket
US Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 99-99015 Filed: 5/21/99
Nsuit: 3535 habeas - death penalty (Fed)
Lankford v. Arave
Appeal from: District of Idaho (Boise)

- -

Case type information:
1) death penalty petition
2) state
3) death habeas corpus

- -

Lower court information:

District: 0976-1 : CV-92-00321-S-WFN
court reporter: Verlene Nelson, Court Reporter
presiding judge: Wm. Fremming Nielsen, Senior Judge
Date Filed: 8/17/92
Date order/judgment: 5/5/99
Date NOA filed: 5/13/99
Date of cert pc: 5/14/99

- -

Fee status: in forma pauperis

- -

Prior cases:
None
Current cases:
None

Docket as of June 7, 2007 11:15 pm Page 1

99-99015 Lankford v. Arave

MARK HENRY LANKFORD Petitioner - Appellant	Andrew H. Parnes, Esq. FAX 208/726-1187 208/726-1010 [COR LD NTC cja] P.O. Box 5988 Ketchum, ID 83340 Charles F. Peterson, Esq. FAX 208/336-2059 208/342-4633 Suite 420 [COR LD NTC cja] PETERSON LAW OFFICES 913 W. River Boise, ID 83702
v.	
ARVON J. ARAVE, Warden, Warden, Idaho State Correctional Institution Respondent - Appellee	Kenneth Robins FAX 208 208/334-2400 [COR LD NTC dag] L. LaMont Anderson, Esq.

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99-99015 Lankford v. Arave

MARK HENRY LANKFORD

Petitioner - Appellant

v.

ARVON J. ARAVE, Warden, Warden, Idaho State Correctional Institution

Respondent - Appellee

99-99015 Lankford v. Arave

5/21/99	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. (eu)
5/21/99	Filed Appellant Mark Henry Lankford's application for stay of execution pending appeal, served on 5/20/99 [3678763] . (MOATT-ME) [99-99015] (eu)
5/28/99	Filed order (Mary M. SCHROEDER, Ferdinand F. FERNANDEZ, William A. FLETCHER,): Aplt's motion for a stay of execution pending disposition of this appeal is granted. Aplt shall designate the reporter's transcript by 7/7/99; the opening brief and excerpts of record are due 8/17/99; the appellees' brief is due 9/16/99; and the optional reply brief, if any, shall be filed within fourteen days from service of the aple's brief. The briefs and excerpts of record shall conform to Ninth Circuit Rule 32-4 (1999). [99-99015] (eu)
7/20/99	Filed motion for extension of time to file Reporter's Transcript until 8/14/99 and deputy clerk order :(Deputy Clerk: JC) granting court reporter Verlene Nelson's an extension to 8/14/99 to file transcripts; appellant's opening brief is due 9/23/99; appellee's brief is due 10/25/99; and the aplt's reply brief, if any, may be file 14 days from service of the aple's brief. All briefs must conform to the provisions set forth in Federal Rules of Appellate Procedure 32 and Circuit Rules 32-1 and 32-4. (Motion recvd 7/16/99) [99-99015] (eu)
7/20/99	Entered appearance of Verlene Nelson as Court Reporter in this case. [99-99015] (eu)
9/16/99	Filed Appellant Mark Henry Lankford's motion for extension of time to file appellant's opening brief until 11/7/99, served on 9/15/99. [99-99015] (eu)

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9/27/99	Filed Appellee A.J. Arave's notice of non-objection to motion for extension of time to file aplt's opening brief, served on 9/22/99. [99-99015] (eu)
10/1/99	Filed order (Deputy Clerk: JC) Aplt counsel's unopposed motion for an extension of time to file the opening brief is granted and briefing will proceed as follows: The aplt's opening brief and excerpts of record are now due 11/9/99; the aple's brief is due 12/9/99; the aplt may file a reply brief 14 days from service of the aple's brief. All briefs must conform to the provisions set forth in FRAP 32 and Circuit Rules 32-1 and 32-4. (phoned at 11:45 a.m.) [99-99015] (eu)
11/2/99	Filed Appellant Mark Henry Lankford's motion for extension of time to file aplt's opening brief until 11/16/99, served on 11/1/99. [3784518] [99-99015] (eu)

11/3/99	Filed order (Deputy Clerk: EU) Aplt counsel's unopposed motion for a second extension of time to file the opening brief is granted and briefing will proceed as follows: The aplt's opening brief and excerpts of record are due 11/16/99; the aple's brief is due 12/16/99; the aplt may file a reply brief 14 days from service of the aple's brief. All briefs must conform to the provision set forth in FRAP 32 and Circuit Rules 32-1 and 32-4. Any further requests fro extension of time to file aplt's opening brief will be view with disfavor. (phoned at 10:30 a.m.) [99-99015] (eu)
11/16/99	Filed Appellant Mark Henry Lankford's motion for leave to file oversized opening brief, served on 11/16/99. (DP) [3792480] [99-99015] (eu)
11/16/99	Received Appellant Mark Henry Lankford's original and 15 copies opening brief of 170 pages or 40,276 words and 5 copies of excerpts of record in 7 volumes (Informal: n) deficient:y (motion for leave to file oversized pending) Served on 11/16/99. (DP) [99-99015] (eu)
11/18/99	Criminal Justice Act voucher sent (Voucher # Electronic) to E. Evans Young for Appellant Mark Henry Lankford and to Andrew H. Parnes for Appellant Mark Henry Lankford. (copy Casefile) [99-99015] (eu)
11/26/99	Filed Appellee A.J. Arave's response to motion to file oversize brief, served on 11/24/99. (DP) [99-99015] (eu)
11/30/99	Filed Appellant Mark Henry Lankford's reply in response to respondent's opposition to motion to file oversized brief; served on 11/29/99. (MOATT-DP) [99-99015] (eu)
12/9/99	Filed atty Andrew H. Parnes's ex parte motion for interim CJA payment (APPELLATE COMMISSIONER w/ CJA voucher) (sa)
12/14/99	Filed A.J. Arave's motion for extension of time to file brief until after the court rules on pending motion to dismiss appeal and affidavit in support, served on 12/13/99. (MOATT-DP) [3809889] (eu)

00003

12/28/99 Filed atty E. Evans Young's ex parte motion for interim CJA payment (APPELLATE COMMISSIONER w/ CJA voucher) (sa)

99-99015 Lankford v. Arave

1/6/00 Filed order (Appellate Commissioner) Aplt's motion to file an oversized brief is granted in part and denied in part. aple's motion to strike the opening brief, received 11/16/99 is granted. Aple's motion to dismiss the appeal is denied. Aple's motion to extend the time to file an answering brief is denied as moot in light of the new briefing schedule. The briefing is reset as follows: Aplt's opening brief, not to exceed 28,000 proportionately spaced words or 100 pages of monospaced typeface but otherwirse conforming to FRAP 32, is due 1/31/00; aple's brief is due 3/13/00; the optional reply brief, if any, is due 14 days from service of the aple's brief. Further time extensions to file the brief will be disfavor. (phoned at 10:30 a.m.) [99-99015] (eu)

1/18/00 Filed certificate of record on appeal RT filed in DC 1/12/00. [99-99015] (eu)

1/31/00 Filed original and 15 copies Appellant Mark Henry Lankford opening brief (Informal: n) 123 pages and five excerpts of record in 7volumes; served on 1/31/00 [99-99015] (jc)

1/31/00 Filed Appellant Mark Henry Lankford's motion to expand record on appeal. [99-99015] served on 1/31/00 [3839296] (MOATT-ME) [99-99015] (jc)

2/4/00 Filed order MOATT (ME) referring aplt's motion to expand the record and any response to the merits panel for disposition. [99-99015] (jc)

2/15/00 Filed order (Appellate Commissioner): The mtn of aplt's apptd csl Andrew Parnes and E. Evans Young for interim payments is granted... Csl may each submit a second interim voucher after the rpy brf is filed, a third interim vch if csl file a petition for rehearing or suggestion for rehearing en banc or a response to such a petition, and a fourth interim vch if csl file a petition for writ of cert or a response to such a petition... [99-99015] (eu)

2/15/00 Filed Appellee A.J. Arave's response to aplt's motion to expand record, served on 2/14/00. (Records for merits panel for disposition, see order of 2/4/00) [99-99015] (eu)

3/8/00 Filed A.J. Arave's motion for an extension of time to 4/27/00 to file appellee's brief and affidavit in support, served on 3/7/00. (DPC) (eu)

3/22/00 Filed order (Deputy Clerk: JC) Aple's unopposed motion for an extension of time to file the aple's brief is granted and the aple's brief is now due 4/27/00. The aplt may file a reply brief 14 days from service of the aple's brief. [99-99015] (eu)

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99-99015 Lankford v. Arave

4/24/00	Filed A.J. Arave's motion for second extension of time to file appellee's brief until 5/18/00 and affidavit in support, served on 4/20/00. (DPU) (eu)
4/25/00	Filed order (Deputy Clerk: JC) Aple's motion for an extension of time to file the aple's brief is granted and the aple's brief is now due 5/18/00. The aplt may file a reply brie 14 days from service of the aple's brief. (phoned csl) [99-99015] (eu)
5/18/00	Received original and 15 copies of A.J. Arave's brief of 122 pages or 26,459 proportionately spaced typeface words; and five copies of supplemental excerpts of record in 1 volume; served on 5/17/00 deficient: (oversized awaiting on motion for leave to file oversized) [99-99015] (eu)
5/18/00	Filed "faxed" A.J. Arave's motion for leave to file oversized brief and declaration in support thereof, served on 5/18/00. (DP-STAFFATTY mtn and brief) [3913142] (eu)
5/25/00	Filed order (Deputy Clerk: me) granting appellee's motion to file oversized brief [3913142-1] [99-99015] (nc)
5/25/00	Filed original and 15 copies appellee A.J. Arave's 125 pages brief, 1 Exc. vols: ; served on 5/17/00 [99-99015] (nc)
5/31/00	Filed Appellant Mark Henry Lankford's motion for an extension of time to 6/26/00 to file his reply brief, served on 5/30/00. (DPU) [99-99015] (eu)
6/12/00	Filed order (Deputy Clerk: EU) Aplt's motion for 18 day extension of time to file reply brief is granted. The reply brief shall be filed on or before 6/23/00. [99-99015] (eu)
6/27/00	Filed Appellant Mark Henry Lankford's motion for leave to file oversized reply brief, served on 6/23/00. (DP-STAFF/ATTY) [99-99015] (eu)
6/27/00	Received original and 15 copies Mark Henry Lankford's reply brief of 11,231 words; served on 6/23/00. (oversized; motion pending for leave to file)(DP-STAFF/ATTY) [99-99015] (eu)
6/29/00	Filed order MOATT (ME) Appellant represents that his reply brief is comprised of 11,231 words. Appellant's motion to file an oversized reply brief is granted. [99-99015] (eu)
6/29/00	Filed original and 15 copies Mark Henry Lankford's reply brief of 11,231 words; served on 6/23/00. (originally rec'd on 6/27/00)(RECORDS) [99-99015] (eu)

99-99015 Lankford v. Arave

6/29/00	Received Andrew H. Parnes for Appellant Mark Henry Lankford letter dated 6/26/00 re: requesting oral argument to be set on an expedited basis. (Calendar Unit) [99-99015] (eu)
1/29/01	Received Gilda Howard's letter re: appeal 99-99015, pertaining to the murder of her son and daughter in law.

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(Casefiles) [99-99015] (eu)

1/30/01 Calendar check performed [99-99015] (aw)

2/12/01 CALENDARED: PORTLAND Nov 8 2001 9:00 am [99-99015] (aw)

2/12/01 Received letter from Andrew Parnes for Appellant Mark Henry Lankford re calendaring of case and availability. (Calendar) [99-99015] (eu)

2/14/01 Filed Mark Henry Lankford's additional citations, served on 2/13/01. (faxed to panel) [99-99015] (eu)

2/23/01 Filed order (Deputy Clerk: EU) The parties are directed to file supplemental briefs addressing the effect, if any, on the analysis in this case of the case of Hoffman v. Arave, 236 F.3d 523 (9th Cir. 2001). Aplt's brief shall be filed within 21 days of the date of this order, and aple's response in a like time after filing of aplt's brief. No reply brief will be filed. All briefs shall not exceed ten pages or 2,800 words in length and shall conform to the format requirements of Circuit Rule 32-3. The briefs may be in the form of letters to the clerk of this court, with the following notation conspicuosly placed on the first page: "Letter brief by order of the court" A copy of this order is also to be attached to the letter briefs. [99-99015] (eu)

3/14/01 Filed original and 4 copies Appellant Mark Henry Lankford supplemental brief (stipulation re limited remand) of 2 pages, served on 3/12/01. (FEDEX TO PANEL) [99-99015] (eu)

3/15/01 Filed order (Deputy Clerk: EU) Aplt's motion to expand the record is granted. [99-99015] (eu)

3/27/01 Filed order (Deputy Clerk: JC) The panel to which this case is assigned has directed the entry of the following order. The parties' stipulation for limited remand is GRANTED. This case is REMANDED to the district court for further proceedings. In complying with this mandate, the district court may enter such orders as it deems appropriate, including, without limitation, vacating or amending prior orders or judgments. The court may hold such hearings as it deems appropriate, if any, including evidentiary hearings. Any appeal(s) from further orders of the district court will be consolidated with this appeal. A briefing schedule will be set by order of this court. The oral argument date is vacated and the case shall be reset for hearing after any subsequent briefing is complete. [99-99015] (eu)

5/16/03 Received copy of District Court Memorandum Decision and Order on Remand filed on 5/16/03: ...Lankford has failed to set forth a constitutional violation which would entitle him to relief...(DP/STAFF-ATY) [99-99015] (eu)

5/29/03 Filed order (Appellate Commissioner: PLS) Given the posture of this case, the Clerk shall strike all briefs previously filed. Because the USDC granted a Certificate of Probable Cause before the Supreme Court decided Slack v. McDaniel, 529 U.S. 473, 481-82 (2000), this case is remanded to the

district court for the limited purpose of allowing the district court an opportunity at its earliest convenience to rule on what issue or issues in this case meet the standard for a COA. See US v. Asrar, (cite). A briefing schedule will be set after the district court issues its ruling. Limited remand to USDC for COA ruling. (served to csl and usdc) (DP-Staff/Aty) [99-99015] (eu)

6/29/04 Filed USDC's response to 5/29/03 court's order on limited remand to USDC re: issues on COA. (Documents entitled "Order Re: Certificate of Appealability" "Petitioner's Supplemental Notice of Appeal" Filed in the USDC on 6/28/04. (DP/STAFF-ATTY) [4749766-1] [99-99015] (eu)

6/30/04 FILED CERTIFIED RECORD ON APPEAL: 4 CLERK'S RECORDS & 5 REPORTER'S TRANSCRIPTS.(ORIGINAL) BOXCAR # 10 [99-99015] (sd)

7/19/04 Filed order MOATT(ME) This case has returned following a limited remand to the district court. All briefs previously filed on appeal were striken by the Appellate Commissioner's 5/29/03 order. The briefing schedule for this appeal is set as follows: Aplt's opening brief and excerpts of record are due 9/16/04; Aple's responsive brief and its excerpts of record, if any, are due 11/15/04; Aplt's optional reply brief, if any, is due within 21 days from service of Aple's brief. (Faxed/Served to Csls) [99-99015] (pi)

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8/2/04 Filed Appellant Mark Henry Lankford's Motion to Broaden the Certificate of Appealability; served on 07/30/04. (DP-Staff/Atty)[5138192] [99-99015] (pi)

8/4/04 Filed order MOATT (ME) Appellant's motion for a broader certificate of appealability is denied as unnecessary. Counsel is directed to refer to Ninth Circuit Rule 22-1(e). See 9th Cir.R. 22-1(e) (Rec. 1-1-04). The briefing schedule set in the deputy clerk's July 19, 2004 order remains in place. (Faxed/Served Csls) [99-99015] (pi)

9/10/04 Filed Appellant Mark Henry Lankford's Motion for extension of time to 10/14/04 to file opening brief; served on 9/9/04. (DP-Staff/Atty) [5176033] [99-99015] (pi)

9/13/04 Filed order MOATT(ME) Appellant's unopposed motion for a 28-day extension of time, until October 14, 2004, to file his opening brief is granted. Aple's answering brief is due 12/14/04. Aplt's optional reply brief, if any, is due within 21 days from service of the answering brief. (Phoned/faxed/served Csls) [99-99015] (pi)

10/5/04 Filed Appellant Mark Henry Lankford's motion for extension of time to 11/9/04 to file his opening brief; served on 10/1/04. (DP-Staff/Atty) [99-99015] [5198565] [99-99015] (pi)

10/15/04 Filed order MOATT (ME) Appellant's unopposed motion for a second extension of time, until 11/9/04, to file his opening brief is granted. Aple's answering brief is due 01/11/05. Appellant's optional reply brief, if any, is due within 21 days from service of the answering brief. (Phoned/faxed/Served Csls) [99-99015] (pi)

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11/9/04	Filed Appellant Mark Henry Lankford's motion to file oversized opening brief of 27,959 words (129 pages); served w/ proposed brief and attached excerpts of record in 8 volumes; served on 11/8/04. (DP-Staff/Atty) [99-99015] [5231461] [99-99015] (pi)
11/12/04	Filed order MOATT (ME) Appellant's motion to file an oversized opening brief, which he as certified contains no more than 27,959 words, is granted. Aple's answering brief, subject to the same size limitations, is due 01/14/05. Aplt's optional reply brief, if any, is due within 21 days from service of the answering brief. (Phoned/Faxed/Served to Csls) [99-99015] (pi)
11/12/04	Filed oversized original of Appellant Mark Henry Lankford's opening brief of 129 pages or 27,959 words and five copies of excerpts of record in 8 volumes; served on 11/8/04. ***(NOTE: See 11/12/04 Order Granting Mtn to File Ovsz Brief Phoned Csls Requesting for remaining copies of brief to be overnighted to this Court) [99-99015] ****11/15/04 Rcv'd additional copies of brief***** (pi)

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12/15/04	Received (obtained from PACER) copy of District Court order filed on 1/14/02 appointing Charles Peterson as substitute counsel of record in place of E. Evans Young (CASE FILES) (Filed by Hon. Wm. Nielsen) [99-99015] (sa)
12/15/04	Criminal Justice Act voucher sent () to Charles F. Peterson for Appellant Mark Henry Lankford [99-99015] (sa)
12/28/04	CJA voucher received and returned to counsel Charles Peterson: premature and incomplete (sa)
1/7/05	Filed Aple Arvon J. Arave's Motion For Extension of Time to 2/15/05, to File Answering Brief; w/attached Affidavit of Support to Motio; Served on 1/6/05. (DP-Staff/Atty) [99-99015] [5287649] (pi)
1/7/05	Filed order MCATT (ME) Appellee's unopposed motion for an extension of time, to 2/15/05, to file its answering brief is granted. Aplt's optional reply brief, if any, is due within 21 days from service of the answering brief. (Faxed/Served Csl) [99-99015] (pi)
2/8/05	Filed Aple Arvon J. Arave's Motion for Extension of Time to 3/18/05 to File Aple's Brief; with affidavit in support of motion; served on 2/7/05. (Served to DP-Staff/Atty & App.Com) [5322817] (pi)
2/14/05	Filed order MCATT (ME) Appellee's unopposed motion for a second extension of time, to 3/18/05, to file its answering brief is granted. Appellant's optional reply brief, if any is due within 21 days from service of the answering brief. (Phoned/Served Csl) [99-99015] (pi)
3/8/05	Filed Aple Arvon J. Arave's Motion for Extension of Time to 4/8/05 to File Aple's Brief with attached affadavit; Served on 3/7/05. (DP-Staff/Atty) [99-99015] [5354652] (pi)

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3/9/05 Filed order MOATT (ME) Aple moves for a 21-day extension of time, to April 8, 2005, to file the answering brief. Aple's third unopposed motion for extension of time to file the answering brief is granted. Any further extension of time to file the answering brief is disfavored. Aplt's optional reply brief, if any, is due within 21 days from service of the answering brief. (Phoned/Faxed/Served Csl) [99-99015] (pi)

3/31/05 Filed Aple A.J.Arave's Motion for Extension of Time to 4/22/05 to File Aple's Brief with attached affidavit of support to motion; served on 3/30/05. (DP-Staff/Atty) [5383448] (pi)

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4/5/05 Filed order MOATT (ME) Appellee moves for a fourth extension of time to file the answering brief. Aple's unopposed motion is granted. Aple's brief is now due on 4/22/05. Aplt's optional reply brief, if any, is due within 21 days from service of the answering brief. (Faxed/Served to Csl) [99-99015] (pi)

4/25/05 Filed Respondent's Motion to File Oversized Brief (30,660 words or 141 pages) with attached affidavit of support; served on 4/22/05. (DP-Staff/Atty) [99-99015] [5411759] (pi)

4/26/05 Received Respondent's Oversized Brief of 141 pages/ 30660 words; Served on 4/22/05. (Motion to File Oversized Pending w/ DP-St/Atty) (DP-Staff/Atty) [99-99015] (pi)

4/27/05 Filed order MOATT (ME) Appellee's motion to file oversized answering brief comprised of 30,660 words is denied. The Clerk shall strike the proposed answering brief received by this Court on April 25, 2005. Aple's replacement answering brief, not to exceed 27,959 words as stated in the deputy clerk's 11/12/04 order, is due May 18, 2005. The optional reply brief, if any, is due within 21 days from service of the answering brief. (Phoned/Faxed/Served Csl) [99-99015] (pi)

5/16/05 Filed original and 15 copies of appellee Arvon J. Arave's 130 pages and (21,959 words) ; with 5 copies of excerpts of record; ; served on 5/12/05. (Casefiles & Records Unit) [99-99015] (pi)

5/31/05 Filed Appellant Mark Henry Lankford's Motion for Extension of Time to 7/1/05 to file his reply brief; served on 5/24/05. (DP-Staff/Atty)[5454698] [99-99015] (pi)

6/7/05 Filed order MOATT (ME) Appellant's unopposed motion for an extension ofotime, until 7/1/05 to file his reply brief is granted. [5454698-1] (FAXED/SERVED to Csl) [99-99015] (pi)

6/23/05 Filed Appellant Mark Henry Lankford's Motion for Extension of Time to 7/13/05 to File Reply Brief; Served on 6/22/05. (DP-Staff/Atty) [99-99015] [5476270] [99-99015] (pi)

6/24/05 Filed order MOATT (ME) Appellant's unopposed motion for second extension of time, until July 13, 2005, to file his reply brief is granted. (Phoned/Faxed/Served Csl) [99-99015] (pi)

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7/14/05 Filed Appellant Mark Henry Lankford's motion for leave to file an oversized brief, (motion is accompanied by one copy of proposed reply brief of 53 pgs.) served on 7/13/05. (DP-Staff/Atty) [99-99015] (eu)

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7/18/05 Filed order MOATT (ME) Appellant's motion to file an oversized reply brief, comprised of 11,709 words, is granted. (Phoned/Faxed Csl) [99-99015] (pi)

7/18/05 Filed original of Petitioner's oversized reply brief of 53 pgs or 11,709 words; served on 7/13//05. (See 7/18/05 Order granting motion to file oversized brief; contacted Petitioner's Csl, to overnight remaining copies. (Phoned/Faxed/Served Csl) [99-99015] (pi)

7/20/05 RECEIVED remaining copies of Aplt's Reply Brief (15 copies), per 7/18/05 Order. (Casefiles) [99-99015] (pi)

8/2/05 CALENDARED: Seattle November 16, 2005 9:00 am Courtroom @ Park Place, 21st Floor ** moved to TUE Nov 15 2005 *** [99-99015] (mw)

8/19/05 Filed order (Deputy Clerk: pi) Oral argument on the merits will be held on Wednesday, Nov. 16, 2005, at 9:00 a.m., in the 21st Floor Ctrm at Park Place Building, 1200 Sixth Avenue, in Seattle, Washington. Each side will be (30) minutes to present thier arguments. (Phoned, Faxed & Served Csl) [99-99015] (pi)

10/6/05 CJA travel authorization sent (Authorization # 9CJA99-990151105) to Andrew H. Parnes for Appellant Mark Henry Lankford . [99-99015] (ay)

10/24/05 Filed order (Deputy Clerk: pi)Oral argument is rescheduled to Tuesday, November 15, 2005, at 9:00 am, in the 21st Floor Courtroom of the Park Place Building, 1200 Sith Avenue, in Seattle, Washington. (Phone/Faxed Csl) [99-99015] (pi)

11/15/05 ARGUED TO Stephen R. REINHARDT, William A. FLETCHER, Jay S. BYBEE; SUBMISSION DEFERRED. [99-99015] (sb)

11/25/05 Filed Appellee Arvon J. Arave and Appellant Mark Henry Lankford's joint response to this court's question raised at oral argument on 11/15/05 Re: consideration on mediation with the assistance of the court; served on 11/21/05. (faxed to panel and served to mediation office) [99-99015] (eu)

11/28/05 GTA bill reconciled (Paid) for Andrew H. Parnes for Appellant Mark Henry Lankford . Authorization #: 9CJA99-990151105 [99-99015] (ay)

12/1/05 CJA 21 travel voucher processed. (CJA 21 #: 102005) for Andrew H. Parnes for Appellant Mark Henry Lankford . [99-99015] (mv)

12/2/05 Filed order (Stephen R. REINHARDT, William A. FLETCHER, Jay S. BYBEE): This case is referred to the Settlement Unit to explore a possible resolution through mediation. Submission of this appeal has been deferred pending further order of this court. *(Phone/Fax Csl and Served Mediation)* [99-99015] (pi)

12/7/05 Filed order CONFATT (EM) This case under consideration for inclusion in the Mediation Program. See FRAP 33 and Nicnth Circ. Rule 33-1. A settlement assessment confernece will be held by telephone on 12/8/05 at 4:00 p.m. Pacific (SF)Time. A Circuit Mediator will initiate the telephone call and contact each participant at the telephone number listed on the attached list. Check the information for completeness and accuracy. Questions or comments about the conference date or participants should be directed to the Mediation Assistant via fax at 415-556-9725. Procedures governing the assessment conference and the Mediation Program are discussed in the attached memorandum..... (See order for full text)(Faxed/Served/Phoned Csl) [99-99015] (pi)

1/3/06 Filed order CONFATT (DEL) Case referred to Confatt for assessment conference only. Conference to be on 1/26/06 at 10:00 . By telephone (y/n): n . [99-99015] (pi)

1/19/06 Filed order CONFATT (DEL)The mediation previously set for January 26, 2006, is rescheduled to February 9, 2006, at 10:00 am., at the U.S. District Court, 550 West Fort Street, Boise, Idaho. Mediation statements shall be submitted to the Chief Circuit Mediator (fax no. 415-556-9725) on or before February 3, 2006. Except for these date changes, all provisisions of the court's order of January 3, 2006, shall apply. (Served to Csl) B [99-99015] (pi)

2/15/06 Filed order CONFATT (DEL) This cse is released from the Mediation Program. All further inquiries regarding this appeal should be directed to the Clerk's Office. (Served to Csl and Panel) [99-99015] (pi)

11/7/06 Case resubmitted on this date to Stephen R. REINHARDT, William A. FLETCHER, Jay S. BYBEE. (See previous deferral of submission.) Order filed: 11/7/06. [99-99015] (pi)

11/7/06 FILED OPINION: REVERSED & REMANDED (Terminated on the Merits after Oral Hearing; Reversed & Remanded; Written, Signed, Published. Stephen R. REINHARDT; William A. FLETCHER; S. BYBEE, author.) FILED AND ENTERED JUDGMENT. [99-99015] (pi)

11/14/06 Filed Respondent's Motion for Extension of Time to 12/19/06 to File Petition For Rehearing/ Rehearing En Banc w/ attached affidavit in Support of Motion; Served 11/13/06. (Faxed/Served to Panel) (pi)

11/28/06 Filed order (Stephen R. REINHARDT, William A. FLETCHER, Jay S. BYBEE): Respondent-Aplt's motion for an extension

of time until December 19, 2006, to file a petition for rehearing and petition for rehearing en banc is hereby GRANTED. (Phoned/Faxed/Served Csl) [99-99015] (pi)

12/12/06 Filed Aple's Motion for Extension of time to 01/2/07 to File Petition for Rehearing w/ Rehearing En Banc; Served on 12/11/06. (Faxed/Served to Panel) (pi)

12/18/06 Filed order (Stephen R. REINHARDT, William A. FLETCHER, Jay S. BYBEE): Respondent-Aple's motion for an extension of time until 01/02/07, to file a petition for rehearing and petition for rehearing en banc is hereby GRANTED. (Faxed/Phoned Csl) [99-99015] (pi)

12/22/06 Filed Respondent-Aple's Motion for Extension of Time to 01/03/07 to File Petition for Rehearing w/Rehearing En Banc; Served on 12/21/06. (Faxed to Panel) (pi)

12/29/06 Filed order (Stephen R. REINHARDT, William A. FLETCHER, Jay S. BYBEE,): granting appellee's motion to extend time to file a petition for rehearing for one day. PHONED attorneys 4:00pm [6044471-1] [99-99015] (gar)

1/3/07 Filed original and 50 copies of Aple's Petition for Rehearing and Rehearing En Banc of 21 pages or 4,197 words; Served on 01/02/07. (Panel and All Active Judges) (pi)

1/29/07 Filed order (Stephen R. REINHARDT, William A. FLETCHER, Jay S. BYBEE): The panel judges have voted to deny aple's petition for rehearing and petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. FRAP 35. Aple's petition for rehearing and petition for rehearing en banc, filed January 3, 2007 is DENIED. (Faxed/Served Csl) [99-99015] (pi)

2/5/07 Filed Faxed Copy of Respondent's Motion for Order Staying Issuance of the Mandate pending filing of Petition for Writ of Certiorari w/ USSC; Served on 2/5/07; (Orig. to Follow by mail)[Faxed to Panel]. [99-99015] [6082028] (pi)

2/6/07 Filed order (Stephen R. REINHARDT, William A. FLETCHER, Jay S. BYBEE): Respondent's motion for stay the issuance of the mandate pending the filing of a petition for a writ of certiorari in the U.S. Supreme Court is GRANTED. (Phoned/Faxed/Served Csl) [99-99015] (pi)

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4/19/07 Received letter from the Supreme Court dated 4/11/07 notifying this court that filing of petition for writ of certiorari has been extended to June 14, 2007. (Panel) . [99-99015] (pi)

6/5/07 Received letter from the Supreme Court dated 5/31/07 in Application No. 06A962 re: The application for an extension of time within to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kennedy, who on 5/31/07 extended the time to and including 6/28/07. (CASEFILES) [99-99015] (eu)

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NO. 99-99015

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARK HENRY LANKFORD,

Petitioner-Appellant,

v.

A.J. ARAVE, Warden, Idaho State
Correctional Institution,

Respondent-Appellee.

Appeal From the United States District Court
In the District of Idaho,
The Honorable William Fremming Nielsen, Presiding

RESPONDENT-APPELLEE'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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STATEMENT OF COUNSEL

By finding Mark Lankford ("Lankford") met his burden of establishing deficient performance and prejudice, the panel's decision conflicts with Strickland v. Washington, 466 U.S. 668 (1984), and its Supreme Court and Ninth Circuit progeny.

The panel concluded Gregory FitzMaurice's representation was deficient because "there was no reasonable tactical advantage in requiring an erroneous jury instruction that would allow the jury to give greater weight to Bryan's testimony." Lankford v. Arave, 468 F.3d 578, 584 (9th Cir. 2006). (Appendix D). The panel's finding of deficient performance ignores the **presumption** that counsel's conduct was sound trial strategy and improperly shifts the burden to the state to establish FitzMaurice's submission of instruction 15 was a matter of strategy.

The panel also concluded there was prejudice because, "Although there is overwhelming evidence that one or both of the Lankford brothers killed the Bravences, only Bryan's testimony singled out Mark as the killer." Id. at 586 (emphasis omitted). However, because Lankford was charged with felony-murder, it was not necessary for the state to provide corroborative evidence that he committed the murders, only corroborative evidence of the underlying felony – robbery – which the state provided.

ISSUES

Because he failed to overcome the presumption that FitzMaurice's decision to submit instruction 15 might be considered a sound trial strategy, has Lankford failed to establish deficient performance?

Alternatively,

Because the state provided corroborative evidence that connected or tended to connect Lankford to the robbery, has he failed to establish prejudice?

STATEMENT OF THE CASE

The Idaho Supreme Court detailed the facts surrounding the first-degree murders of retired Marine officer Robert Bravence and his wife, Cheryl. State v. Lankford, 781 P.2d 197, 201 (Idaho 1989) (Appendix A). Lankford was charged with two counts of felony-murder stemming from injuries inflicted during the course of a robbery perpetrated by Lankford and his brother, Bryan Lankford ("Bryan"). (Appendix B.)

FitzMaurice was appointed to represent Lankford. In preparation for trial, FitzMaurice conducted extensive research regarding jury instructions, traveling to the University of Idaho law school library. (Tr., pp.50-51.)[1] Because there were no pattern criminal jury instructions, it was FitzMaurice's practice to use California and federal patterned instructions and, after reviewing Idaho law, draft instructions complying with Idaho law. (Tr., p.120.) Because he had access to the archives at the University, FitzMaurice also relied upon instructions from other Idaho cases contained in the clerks' records. (Tr., pp.120-21.) As a result of his research, FitzMaurice requested three instructions regarding accomplice testimony,

[1] The following references are used in this brief: "Tr." refers to the federal evidentiary hearing transcript; "E.R." refers to Lankford's Excerpts of Record; "S.S.E.R." refers to the state's Second Excerpt of Record.

which were given by the trial court. Proposed instruction 16, given as instruction 15 (E.R., p.394), states:

> An accomplice is one who united with another person in the commission of a crime, voluntarily and with common intent. An accomplice does not become incompetent as a witness because of participation in the crime charged. On the contrary, the testimony of one who asserts by his testimony that he is an accomplice, may be received in evidence and considered by the jury, even though not corroborated by other evidence, and given such weight as the jury feels it should have. The jury, however, should keep in mind that such testimony is always to be received with caution and considered with great care.
>
> You should never convict a defendant upon the unsupported testimony of an alleged accomplice, unless you believe that unsupported testimony beyond a reasonable doubt.

Proposed instruction 19, given as instruction 18 (E.R., p.397), states:

> You are instructed that a defendant cannot be found guilty based upon the testimony of an accomplice unless such testimony is corroborated by other evidence which tends to connect such defendant with the commission of the offense.

Proposed instruction 20, given as instruction 19 (E.R., p.398), states:

> To corroborate the testimony of an accomplice there must be evidence of some act or fact related to the offense which, if believed, by itself and without any aid, interpretation or direction from the testimony of the accomplice, tends to connect the defendant with the commission of the offense charged.
>
> However, it is not necessary that the evidence of corroboration be sufficient in itself to establish every element of the offense charged, or that it corroborate every fact to which the accomplice testifies.

> In determining whether an accomplice has been corroborated, you must first assume the testimony of the accomplice has been removed from the case. You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the offense.
>
> If there is not such independent evidence which tends to connect defendant with the commission of the offense, the testimony of the accomplice is not corroborated.
>
> If there is such independent evidence which you believe, then the testimony of the accomplice is corroborated.

Instructions 18 and 19 are correct statements of Idaho law, while portions of instruction fifteen contradict I.C. § 19-2117, which reads as follows:

> A conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient, if it merely shows the commission of the offense, or the circumstances thereof.

Bryan, whose trial was completed prior to the start of Lankford's trial (E.R., p.257), testified against Lankford (E.R., pp.154-355; S.S.E.R., pp.688(a)-(d)). Lankford was found guilty of both counts of first-degree murder (S.S.E.R., pp.830-31) and sentenced to death (E.R., pp.474-81). Lankford was denied post-conviction relief by the trial court (E.R., pp. 942-

49). The Idaho Supreme Court affirmed Lankford's conviction, sentence and denial of post-conviction relief. Lankford, 781 P.2d 197.

Lankford filed a federal habeas petition. Initially, the district court dismissed Lankford's ineffective assistance of counsel claims based upon procedural default because they were improperly presented to the Idaho Supreme Court. (E.R., pp.1639-64.) However, pursuant to the parties' stipulation, based on Hoffman v. Arave, 236 F.2d 523, (9th Cir. 2001), this Court remanded Lankford's case. (S.E.R., pp.923-24.) An evidentiary hearing was conducted on Lankford's ineffective assistance of counsel claims, including his claim that FitzMaurice was ineffective by submitting instruction 15. Addressing this claim, the district court concluded FitzMaurice's performance was deficient, but determined Lankford failed to establish prejudice. (E.R., pp.1857-62.)

On November 7, 2006, addressing only Lankford's claim regarding jury instruction 15, the panel reversed with instructions to grant the writ and retry Lankford "within a reasonable time or release him." Lankford, 468 F.3d 578.

ARGUMENT

A. To Establish Deficient Performance, Lankford Has The Burden Of Overcoming The Presumption That FitzMaurice's Decision To Submit Instruction 15 Was Not Tactical

For Lankford to establish ineffective assistance of counsel, he has the burden of proving the two-prong test of Strickland, 466 U.S. at 687, deficient performance and prejudice. In Strickland, the Supreme Court repeatedly emphasized the "presumption" that counsel's representation is constitutionally adequate. The Court explained that "specific guidelines are not appropriate" when determining whether "counsel's representation fell below an objective standard of reasonableness" because the Sixth Amendment "relies instead on the legal profession's maintenance of standards sufficient to justify the law's **presumption** that counsel will fulfill the role in the adversary process that the Amendment envisions." Id. at 688 (emphasis added). Because "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence," "[j]udicial scrutiny of counsel's performance must be highly deferential." Id. at 689. "Because of the difficulties inherent in making the evaluation, a court must indulge a **strong presumption** that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the **defendant must overcome the presumption** that, under the circumstances, the

challenged action '**might be** considered sound trial strategy.'" Id. (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)) (emphasis added). Finally, the Court explained, that in making a deficient performance determination, not only must the courts remember counsel's function "is to make the adversarial testing process work in the particular case . . . , the court should recognize that counsel is **strongly presumed** to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (emphasis added).

The Strickland presumption of reasonableness has been repeatedly emphasized by the Supreme Court, most recently in Bell v. Cone, 535 U.S. 685, 698 (2002) ("even when a court is presented with an ineffective-assistance claim not subject to § 2254(d)(1) deference a defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy") (internal quotes and citations omitted).

Likewise, this Court has recognized "there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action **might be** considered sound trial strategy.'" Fields v. Woodford, 309 F.3d 1095, 1107 (9th Cir. 2002), as

further amended, 315 F.3d 1062 (9th Cir. 2002) (emphasis added); *see also* Hovey v. Ayers, 458 F.3d 892, 904 (9th Cir. 2006); United States v. Fredman, 390 F.3d 1155, 1156 (9th Cir. 2004); Brodit v. Cambra, 350 F.3d 985, 992 (9th Cir. 2003).

To overcome the presumption that FitzMaurice's decision to submit instruction 15 after conducting extensive research regarding jury instructions was not tactical, the panel concluded, "FitzMaurice simply overlooked important differences between Idaho law and federal law. It was a young lawyer's mistake, akin to failing to check the pocket part, but it was a mistake, plainly enough." Lankford, 468 F.3d at 585. However, at the evidentiary hearing when asked whether he was familiar with I.C. § 19-2117 when he submitted instruction 15, FitzMaurice stated, "I must have since I cited that particular section." (Tr., p.53.) Based upon his research and investigation, FitzMaurice also believed sufficient corroboration existed to meet the requirements of I.C. § 19-2117. (Tr., p.53.) FitzMaurice's decision to submit instruction 15 was not based upon differences between Idaho and federal law but a tactical decision "to forego one defense in favor of another," United States v. Span, 75 F.3d 1383, 1390 (9th Cir. 1996), focusing the entire defense upon the inconsistencies and contractions in Bryan's testimony and prior statements. Admittedly, after more than twenty years

from the time he submitted instruction 15 until he testified, FitzMaurice was unwilling to "confirm the theory," Lankford, 468 F.3d at 584 n.2, but conceded, "That appears to be a plausible reason." (Tr., p.123.)

FitzMaurice's closing argument confirms it was more than a "plausible reason," but the only logical explanation for the instruction's submission.[2] FitzMaurice expressly asked the jury to read instruction 15 "that tells you with reference how to judge a person of this character. How to judge an accomplice in a crime. You're supposed to judge it with caution and due care." (S.S.E.R., p.805.) FitzMaurice dissected Bryan's testimony, repeatedly explaining why he was not a credible witness, beginning with his conviction for robbery in Texas, his demeanor while testifying, his motive for testifying, whether his "story" was a "factual impossibility" and the "multiple stories" he told at various times after the robbery and murders. (S.S.E.R., pp.1583-99.)

Based upon his closing argument, merely because FitzMaurice was unable or unwilling, after twenty years, to confirm that his submission of instruction 15 was tactical does not result in Lankford overcoming the "presumption that, the challenged action 'might be considered sound trial strategy.'" Strickland, 466 U.S. at 689, (quoting Michel, 350 U.S. at 101).

[2] FitzMaurice's closing argument is attached as Appendix C.

Undoubtedly, it is because of the passage of time and unwillingness of defense attorneys to concede their actions constitute strategic decisions that the Supreme Court has imposed a "strong presumption that counsel's conduct falls within the wide range of professional assistance." Id.

Further, the panel's conclusion that a simple reasonable doubt instruction "could have served the same purpose without eliminating the corroboration requirement," Lankford, 468 F.3d at 584 n.2, eliminates FitzMaurice's ability to focus his closing argument and defense upon Bryan's credibility. A general reasonable doubt instruction would not have included the following language from instruction 15: (1) "the jury, however, should keep in mind that such testimony is always to be received with caution and considered with great care;" or (2) "You should never convict a defendant upon the unsupported testimony of an alleged accomplice, unless you believe that unsupported testimony beyond a reasonable doubt." (E.R., p.394.)

Because FitzMaurice's investigation and research regarding jury instructions was reasonable, Lankford has failed to overcome the presumption that FitzMaurice's request fell within the wide range of reasonable professional assistance.

B. Because There Was Corroboration Of His Involvement In The Robbery, Lankford Has Failed To Establish The Outcome Of His Trial Would Have Been Different

In addition to deficient performance, Lankford has the burden of establishing prejudice, requiring that he demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "In making this determination, a court hearing an effectiveness claim must consider the totality of the evidence before the judge or jury." Id. at 695.

In determining Lankford established prejudice, the panel reviewed Idaho law regarding corroboration and concluded, "The only physical evidence presented at trial was circumstantial, and all of that evidence also linked Bryan to the murders. The only evidence tending to show that **Mark was the killer** was his brother's word." Lankford, 468 F.3d at 589 (emphasis added). However, because Lankford was charged with felony-murder and not premeditated murder, Idaho law did not mandate "evidence tending to show that Mark was the killer," but only that he was "connected with the commission of the [robbery]." State v Scroggins, 716 P.2d 1152, 1158 (Idaho 1986).

As explained by the Idaho Supreme Court, "the proof of a murder in the first degree is established in all of its elements by proving (a) the

unlawful killing of a human being (b) in the course of a robbery. The requirement of 'malice aforethought' is satisfied by the fact the killing was committed in the perpetration of a robbery." Lankford, 781 P.2d at 203; *see also* Scroggins, 716 P.2d at 1158 ("In a prosecution for felony-murder, the state is relieved of the burden of proving that a defendant had the specific intent to kill and instead need only prove that all individuals charged as principals had the specific intent to commit the predicate felony"). These principles were provided to the jury. (E.R., p.402.) The jury was further instructed, "it is therefore not necessary that the State prove that this defendant actually committed the act which caused the death of the victims, provided the State prove beyond a reasonable doubt that the defendant was present, and that he aided and abetted in the commission of the crime of robbery as alleged, or that if he was not present, that he advised and encouraged the commission of such crime." (E.R., p.412.) Finally, the jury was instructed as follows:

> If a human being is killed by any one of several persons engaged in the perpetration of the crime of robbery, all persons who either directly and actively commit the act constituting robbery or who with knowledge of the unlawful purpose of the perpetration of the crime aid and abet in its commission, are guilty of murder of the first degree, whether the killing is intentional or unintentional.
>
> Thus, if two or more persons acting together are perpetrating a robbery and one of them, in the course of the

> robbery and in furtherance of the common purpose to commit the robbery, kill a human being, both the person who committed the killing and the person who aided and abetted him in the robbery are guilty of Murder of the First Degree.
>
> A killing that occurs within the perpetration of a robbery embraces not only the actual acts of the transaction, in this case the robbery, and the circumstances surrounding it, but also those acts immediately following it and so closely connected with it as to form in reality a part of the occurrence.
>
> However, where a robbery has been completed prior to the killing and such time has elapsed as to make the killing not a part of the circumstances of the robbery, then and in that event, the defendant can not be convicted of first degree murder.

(E.R., p.417.)

Idaho's appellate courts have discussed extensively the question of what constitutes sufficient corroboration. In State v. Evans, 631 P.2d 1220, 1222 (Idaho 1981) (quoting State v. Gillum, 228 P. 334, 336 (1924)), the Idaho Supreme Court explained, "[t]he degree of corroboration necessary to comply with the statute:"

> No general rule can be stated with respect to the quantum of evidence corroborating an accomplice's testimony which is necessary to warrant a conviction, each case must be governed by its own circumstances, keeping in view the nature of the crime, the character of the accomplice's testimony, and the general requirement with respect to corroboration. Where the circumstances point to the guilt of the accused, independent of the accomplice's testimony, such circumstantial evidence may be a sufficient corroboration of the accomplice's testimony to sustain a conviction. It is not necessary that the testimony of an accomplice be corroborated in every detail. Any corroborative

> evidence legitimately tending to connect the defendant with the commission of a crime may be sufficient to warrant a conviction, although standing by itself it would not be sufficient proof of defendant's guilt.

In State v. Garcia, 630 P.2d 665, 672 (Idaho 1981) (quoting State v. Bassett, 385 P.2d 246, 248 (1963)) (citations omitted), the Idaho Supreme Court reaffirmed the "applicable standards for determining whether an accomplice's testimony is sufficiently corroborated to satisfy the requirements of I.C. § 19-2117:"

> It is not necessary that there be corroborating evidence concerning every material fact as to which the accomplice testified. The statute permits convictions upon the testimony of an accomplice with the limitation that the accomplice shall be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and hence the corroboration be independent of the testimony of the accomplice and connect or tend to connect the defendant with the commission of the crime charged. Corroboration of an accomplice need only connect the accused with the crime, it may be slight, and need only go to one material fact. It may be entirely circumstantial. The jurors are the judges of the weight and credibility of the testimony under proper instructions.

Further, "an innocent explanation does not strip the evidence of its corroborative character," State v. Hill, 97 P.2d 1014, 1019 (Idaho Ct. App. 2004), and merely because an accomplice's testimony is vital to the state's case, does not change the level of corroboration required, *see* State v. Jones, 873 P.2d 122, 126 (Idaho 1994) ("Wystrach's testimony was integral to the

prosecution's case, providing first-hand knowledge of the conspiracy, its subject matter and payoffs").

The panel attempted to distinguish Idaho cases based upon whether a trial court refused a corroboration instruction, and concluded, "the Idaho Supreme Court has demanded substantial evidence of corroboration before it will find the error harmless." Lankford, 468 F.3d at 588. This distinction is unavailing. In State v. Gonzales, 438 P.2d 897, 900 (Idaho 1968), the issue before the court was whether the witness was an accomplice. Because the state asserted the witness was not an accomplice, neither the state nor the court raised the question of whether it was harmless error in not instructing the jury under I.C. § 19-2117. The state is unaware of any Idaho case requiring "substantial evidence of corroboration before it will find the error harmless," as opposed to corroborating evidence that merely establishes a connection with the commission of the offense, Garcia, 630 P.2d at 672, which "may be slight, need only go to one material fact and may be entirely circumstantial." State v. Pecor, 972 P.2d 737, 745 (Idaho Ct. App. 1998).

"Keeping in view the nature of the crime," Evans, 631 P.2d at 1222, it is logical to examine Idaho robbery cases to determine whether Bryan's testimony was sufficiently corroborated. In Evans, the testimony of a criminalist who testified only that it was possible two hairs taken from a ski

mask belonged to the defendant, and the testimony of the victim regarding only the robber's eyes and nose, was sufficient evidence to corroborate an accomplice's testimony. 631 P.2d at 1222. In State v. Pierce, 685 P.2d 96, 842 (Idaho 1984), a case similar to Lankford's, the supreme court concluded testimony establishing the defendant was seen with his two accomplices driving the getaway car before the robbery and driving the car more than thirty minutes after the robbery was sufficient to corroborate the testimony of the accomplices.

Based upon Idaho's robbery cases, Bryan's testimony was sufficiently corroborated. As explained in the prosecutor's closing statement (S.S.E.R., pp.783-84, 791-97), there was significant evidence supporting Bryan's testimony, particularly "the time sequence" and Lankford's statements to Roy Ralmuto. On the day of the Bravences' murder, at approximately 10:00 a.m., Art Goodloe saw a man and woman near a greenish Volkswagen van. When Goodloe returned at approximately 3:30-4:00 p.m. he saw the two people and van near Sheep Creek campground. (S.S.E.R., pp.179-84, 187, 190-91.) That same evening at approximatly 6:30 p.m., Darrell Cox picked up Bryan and Lankford who was carrying a shotgun. At Lankford's request, Cox dropped them off at McAllister campground. (S.S.E.R., pp.339-44, 362-77, 381, 389-91.) Chris Damman and his wife Julie corroborated Cox's

testimony, explaining they were at McAllister campground when Cox dropped off the Lankfords at approximately 7:30 p.m. (S.S.E.R., pp.393-408.) The Lankfords "sort of stood around by the car" making Julie "scared" because "[t]hey weren't real clean, and the gun, and the way they stood around, and they had no – there was no other vehicle there. And that sort of – my mom and I sort of wondered why he was letting them off since there was no houses around that area or anything." (S.S.E.R. pp.405-06.) The brothers were there for approximately 15-20 minutes and then went "down towards the river." (S.S.E.R., pp.398-99.).

Ernest Wells and Deputy Jon Stroop detailed the distances between the locations, including McAllister and Sheep Creek campgrounds, Summit Flat where the two bodies were recovered, and the location where the Lankfords concealed the Camaro they had driven from Texas. (S.S.E.R., pp.227-29, 257-65, 284-87.) Lee VonBargen explained it took approximatly two hours to travel from Summit Flat to Grangeville. (S.S.E.R., p.96.) Leo Pils testified regarding the distance and time to drive from Grangeville to Pendleton, Oregon. (S.S.E.R., pp.714-16.) Based upon the time frame, the prosecutor established significant corroboration permitting him to argue, "Now if Mark wasn't there and wasn't involved and Bryan did this all, they would have had to make a reservation to have Mark have Bryan pick Mark

up. I suggest and submit to you . . . that is absolutely unreasonable." (S.S.E.R., p.793.)

Lankford's finger and palm prints taken from various items inside the Bravences' van (S.S.E.R., pp.578-83) further corroborate Bryan's testimony that his brother was involved in the robbery.

Additionally, Ralmuto testified regarding a conversation with Lankford after returned to Texas and noticed a Department of Public Safety Automobile. Lankford said, "We've got to get out of here and get out of here now." (S.S.E.R., p.1196.) When Ralmuto left Lankford at the Trinity River, Lankford came to Ralmuto, shook his hand and said, "I would never see him alive again nor Bryan alive again. And, then, he sort of waited a minute, and he said: Well, you might see Bryan alive again, but I can promise you you won't see me alive again." (S.S.E.R., p.630.) As explained by the prosecutor, "Is that the kind of comment that someone who had only been involved in the use of the credit cards and possession of the stolen property would make? Is that a situation where you'd go back in the brush and spend the rest of your life? I submit not." (S.S.E.R., pp.794-95.)

Finally, Bryan did not commit the robbery and murders alone. Robert, a retired marine, "was physically in very good shape." (S.S.E.R., p.65.) Based upon Bryan's stature, Robert's physical condition and desire to

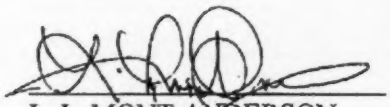
protect his young wife, it is unreasonable to believe Bryan's subsequent stories regarding how he allegedly robbed and murdered the Bravences without his brother's assistance.

As noted in the panel's decision, whether submission of the erroneous instruction was prejudicial is "a harder question" that is "close." Lankford, 468 F.3d at 585, 591. Respectfully, because the panel misapplied Idaho law and overlooked significant corroboration regarding the robbery, the dividing line has moved to the other side. Based upon all the evidence, the state connected or tended to connect Lankford to the robbery. Therefore, because sufficient corroboration was presented to the jury regarding Lankford's involvement in the robbery, if not the murders, he has failed to establish, based upon a reasonable probability, that the outcome of his trial would have been different if FitzMaurice had not submitted the erroneous instruction.

CONCLUSION

The state respectfully requests that rehearing en banc be granted, the panel's decision be vacated and the judgment of the district court be affirmed.

DATED this 2nd day of January, 2007.



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